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No. [redacted] 205

In the Supreme Court of the United States

October Term, [redacted] 1925

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, AND UNITED STATES FIDELITY AND GUARANTY COMPANY, Petitioners,

vs.

THE STATE OF OKLAHOMA, AND THE CITY OF MCALESTER, OKLAHOMA, Respondents.

Petition for Writ of *Certiorari*, and Argument in Support of Same.

JOSEPH W. BRYSON,
CHARLES A. MOSS,
MAURICE D. GREEN,
EDWARD L. SMITH,
Attorneys for Petitioners.

AUTHORITIES CITED.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 729.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, AND UNITED STATES FIDELITY AND GUARANTY COMPANY, ***Petitioners,***

vs.

THE STATE OF OKLAHOMA, AND THE CITY OF McALESTER, OKLAHOMA, ***Respondents.***

PETITION FOR WRIT OF *CERTIORARI.*

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Missouri, Kansas & Texas Railway Company and United States Fidelity and Guaranty Company, respectfully present to this court this, their petition for a writ of *certiorari,* to be directed to the Supreme Court of the State of Oklahoma, commanding said court and the clerk thereof to certify to this court the record and pro-

ceedings of the case in said court, wherein your petitioner, Missouri, Kansas & Texas Railway Company was appellant, and the respondents, the State of Oklahoma and the City of McAlester, Oklahoma, were the appellees, together with the opinion of said court therein, for the review and determination of said cause by this court.

Your petitioners respectfully represent and show to this court that said cause was an appeal by your petitioners from an order of the Corporation Commission of the State of Oklahoma, dated June 16, 1922, by the terms of which your petitioner Railway Company was ordered, directed and required to prepare a plan for a subway crossing of Comanche Avenue, under and across said petitioner's premises in McAlester, Oklahoma, as prayed for by the City of McAlester, together with an estimate of the cost thereof, and said Railway Company and said City were further ordered and directed to undertake to agree on an apportionment of the cost thereof, and said Railway Company was required to have said underpass crossing completed and opened for traffic within ninety days from the date said City should arrange to pay its proportion of the cost.

Your petitioners further represent and show to this honorable court that said Railway Company defended said proceeding before the Corporation Commission of Oklahoma, and before the Supreme Court of the State of Oklahoma, on the ground, not only

that Comanche Avenue had never been extended, by condemnation proceedings or otherwise, over the right-of-way and premises of the Railway Company at said proposed point of crossing, but that a contract existed between said City and said Railway Company, covered by Ordinance No. 74, passed and approved November 8, 1901, by the terms of which it was agreed that if said Comanche Avenue should ever be extended across said Railway Company's premises, it should be by an underpass crossing at the sole cost and expense of said City, in consideration of which, and in consideration of other matters agreed to in said ordinance as to other street crossings, said Railway Company agreed to waive any and all claims for damages because of the opening and extending of said Comanche Avenue over its premises.

Your petitioners further represent and show to this honorable court that the said order of the Corporation Commission of Oklahoma and decision of the Supreme Court of Oklahoma, affirming the same, in effect holds the said contract to be of no force or validity, and that the Corporation Commission had full and exclusive jurisdiction under sections 3491 to 3497, both inclusive, of the Compiled Laws of Oklahoma of 1921, purporting to give exclusive jurisdiction to the Corporation Commission over highway crossings with railroads, including the necessity for and the place and manner of such cross-

ing, and the protection to be required, said law having been passed by the Oklahoma Legislature in 1919.

Your petitioners further respectfully represent and show to this honorable court that, while the Supreme Court of Oklahoma, in its opinion, held that said Railway Company was entitled to compensation for its property taken for the street, which should be determined by proper condemnation proceedings, yet, as shown by the certified copy of the record herewith as "Exhibit A" hereto, and the opinion of the Supreme Court of Oklahoma therein of December 11, 1923, and its action of September 30, 1924, overruling your petitioners' petition for a rehearing, said court declined to refer to or pass on the validity of said contract ordinance, or the contentions of your petitioners as to their rights thereunder or to their contentions duly asserted by them in their petition in error before that court, and in their briefs in support of same; that the order of the Corporation Commission of Oklahoma in refusing to recognize the validity of said contract ordinance, and to abide by its terms, and in making its order contrary thereto, and requiring your petitioner, Railway Company, to bear a portion of the cost and expense of said proposed subway crossing, resulted in the taking of your petitioner Railway Company's property without due process of law, and without compensation, and denied to it the equal protection of

the law, in violation of the Fourteenth Amendment to the Constitution of the United States, and denied to it the right of contract, and impaired the obligation of contracts, in violation of section 10 of article I of the Constitution of the United States.

Your petitioners further state that the said decision of the Supreme Court of Oklahoma, in affirming said order of the Corporation Commission of Oklahoma, in effect denies the validity of said contract ordinance, and imposes burdens, obligations and duties upon your petitioner Railway Company contrary thereto, and in conflict therewith, and denies your petitioners' constitutional rights and immunities, as hereinabove set out.

Your petitioners further respectfully represent and show to this honorable court that, for the reason given herein, a right, title, privilege and immunity claimed by them under the Fourteenth Amendment of the Constitution of the United States and under section 10 of article I of the Constitution of the United States, is denied to them, and the decision of the Supreme Court of Oklahoma, is against such right, title, privilege and immunity so especially set up and claimed by them.

Your petitioners further respectfully show to the court that writ of error has been allowed herein by the chief justice of the Supreme Court of Oklahoma, and the proceedings in this court thereunder are docketed as No. 729 of the October term, 1924,

of this court, and this petition for writ of *certiorari* is being filed in these same proceedings before this court.

Wherefore, your petitioners respectfully pray that a writ of *certiorari* may issue out of and under the seal of this court, directed to the Supreme Court of the State of Oklahoma, sitting at Oklahoma City, Okla., commanding said court to certify and send to this court on a day to be designated, a full and complete transcript of the record and all proceedings of the said Supreme Court of the State of Oklahoma had in said cause, to the end that the said cause may be reviewed and determined by this honorable court, as provided by law, and that the judgment of the Supreme Court of the State of Oklahoma may be reversed by this honorable court, and that your petitioners may have such other and further relief and remedy in the premises as to this court may seem appropriate and in conformity with law, and your petitioners will ever pray.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY AND UNITED STATES FIDELITY AND GUARANTY COMPANY,

By Joseph M. Bryson

.....

.....

.....

Attorneys for Petitioners.

State of Oklahoma,
Muskogee County.—ss.

Maurice D. Green, being first duly sworn, on his oath says that he is one of the attorneys for the petitioners in the above case, that he has read the foregoing petition and knows the contents thereof, and that the allegations therein contained are true, as he verily believes.

.....

Subscribed and sworn to before me this ... day of November, 1924.

.....
Notary Public.

My commission expires .....

I hereby certify that I have examined the foregoing petition and in my opinion the said petition is well founded in law.

.....
Attorney for Petitioner.

ARGUMENT.

This proceeding was commenced by petition by the City of McAlester, Oklahoma, formerly the City of South McAlester, Indian Territory, before the Corporation Commission of Oklahoma, for an order to require petitioner Railway Company to establish and construct at its own sole cost and expense a subway or underhead crossing of Comanche Avenue under the track and across the premises of the Railway Company in said City, which avenue had never been extended over the Railway Company's premises. Petitioner Railway Company's right-of-way and premises were acquired by land grant of the Congress of the United States by Act of Congress of July 25, 1866, 14 Statutes at Large, page 36, petitioner's name then being Union Pacific Railway Company, Southern Branch, and its road was constructed through said City in the years 1872 and 1873.

On November 8, 1901, petitioner Railway Company and said respondent City entered into a contract covered by Ordinance No. 74, providing for certain street crossings then deemed necessary over said Railway Company's premises in said City, and providing further for the terms and conditions under which any additional street crossings might thereafter be extended over said Railway Com-

pany's premises, it being further provided that the Railway Company reserved the right to contest the question of necessity for the opening of any additional streets, and that, as to Comanche Avenue here involved, it was provided in Sec. 9, in said ordinance, that if such avenue should ever be opened across the Railway Company's premises, it should be by an undergrade crossing, at the sole cost and expense of said respondent City, in part consideration of which the Railway Company agreed to waive all claim for damages for the land taken for said Avenue over its premises.

While the Supreme Court of Oklahoma did not directly refer to the constitutional questions presented to it by petitioners, yet the effect of its decision affirming the order of the Corporation Commission is to deny petitioners' constitutional rights, as set up in this petition for *certiorari*. The state court cannot ignore federal constitutional questions and undertake to base its decision on non-federal grounds, and thereby prevent petitioners having the right of review by this court.

—*West Chicago Street Railway Co.* v. *People*, 201 U. S. 506, 50 L. ed. 845;

Ward v. *Board of County Commissioners*, 253 U. S. 17, 64 L. ed. 751.

This court will determine for itself whether or not Ordinance No. 74 was a valid and binding con-

tract between petitioner Railway Company and respondent City.

—*Georgia Railway & Power Co.* v. *Town of Decatur*, 262 U. S. 432, 67 L. ed. 1065.

Petitioner Railway Company's title to its land grant right-of-way and premises is in the nature of a fee title.

—*Missouri, Kansas & Texas Railway Co.* v. *Roberts*, 152 U. S. 114, 38 L. ed. 377;

New Mexico v. *United States Trust Company*, 172 U. S. 171, 43 L. ed. 407.

Petitioner Railway Company's right-of-way and premises are within the protecting clauses of the federal constitution

—*United States* v. *Northern Pacific Railway Company*, 256 U. S. 51, 65 L. ed. 825.

There is a limit to the police power of the cities, beyond which the attempted exercise thereof becomes the taking of property in violation of the Fourteenth Amendment to the Federal Constitution.

—*Martin* v. *District of Columbia*, 205 U. S. 135, 51 L. ed. 743.

At the time petitioner Railway Company and respondent City entered into the contract in question, the City existed under the laws of Arkansas, in force in the Indian Territory, as contained in Mansfield's Digest of the Statutes of Arkansas of 1884, extended over Indian Territory by Act of Con-

gress of February 18, 1901, 31 Stat. 794, by the terms and provisions of sections 749, 760, 764 and 907 of which the City had the power to lay out streets and acquire the ground therefor, resorting to condemnation, if necessary, these sections reading as follows:

> "*Sec. 749.* Cities or incorporated towns, organized or to be organized under the provisions of this act, shall be, and are hereby declared to be bodies politic and corporated, under the name and style of 'the city of .....' or 'the incorporated town of .....,' as the case may be; capable to sue and be sued, to contract and be contracted with, to acquire, hold and possess, property, real and personal; to have a common seal, and to change and alter the same at pleasure, and to exercise such other powers and to have such other privileges as are incident to other corporations of like character or degree, not inconsistent with the provisions of this act or the general laws of the state."
>
> "*Sec. 760.* They shall have power to lay off, open, widen, straighten and establish, to improve and keep in order and repair, and to light streets, alleys, public grounds, wharves, landing places and market places; to open and construct and keep in order and repair sewers and drains *(j)*; to enter upon, or take, for such of the above purposes as may be required, land or material, and to assess and collect a charge on the owner or owners of any lot or land, or on lots or lands through or by which a street, alley or public highway shall pass, for the purpose of defraying the expenses of constructing, improving, repairing or lighting such street, alley or public highway, to be in proportion to the

value of such lot or land as assessed for taxation under the general law of the state."

"*Sec. 764.* Municipal corporations shall have power to make and publish, from time to time, by-laws or ordinances, not inconsistent with the laws of the state, for carrying into effect or discharging the powers or duties conferred by the provisions of this act. * * *"

"*Sec. 907.* When it shall be deemed necessary by any municipal corporation to enter upon or take private property for the construction of wharves, levees, parks, squares, market places or other lawful purposes, an application in writing shall be made to the Circuit Court of the proper county or to the judge thereof in vacation, describing as correctly as may be the property to be taken, the object proposed, and the name or names of the owner or owners, and of each lot or parcels thereof known; notice of the time and place of such application shall be given, either personally in the ordinary manner of serving process or by publishing a copy of the application, with a statement of the time and place at which it is to be made, for three weeks next preceding the time of application, in some newspaper of general circulation in the county. If it shall appear to the court or judge that such notice has been served ten days before the time of application, or has been published as provided, and that such notice is reasonably specific and certain, then the court or judge may set a time for the inquiry into and assessment of compensation by a jury before said court or judge."

It is a general rule of law that cities have the power to make such contracts as may be necessary to carry out the powers conferred upon them.

—Dillion's Municipal Corporations, Vol. 1, page 512;
Elliott on Contracts, Vol. 1. Sec. 601.

Contracts similar as to conditions and facts and like in principle, have been upheld by the courts.

—*City of Argentine* v. *Atchison, T. & S. F. Ry. Co.*, (Kansas, 1895) 41 Pac. 946;
Hicks v. *Chesapeake & Ohio Ry. Co.*, (C. of A. Va. 1903) 45 S. E. 888.

As shown by the record presented herewith, petitioner Railway Company and respondent City lived up to and adhered to all of the terms and provisions of this contract up to the time of the filing of the petition herein before the Corporation Commission of Oklahoma, and the City having so repeatedly ratified the contract, should now be estopped from undertaking to repudiate it.

—*State, ex rel. City of Carthage*, v. *Cowgill & Hill Mill Company*, 55 S. W. 1008.

The contract was a private, or business, contract, rather than one affecting the police power of the City, and it is estopped to deny its validity.

—Elliott on Contracts, Vol. 1, Sec. 615;
First National Bank of Red Oak v. *City of Emmettsburg*, (Iowa, 1912) 138 N. W. 451;

Hitchcock, et al., v. *City of Galveston*, 96 U. S. 341, 24 L. ed. 659;

Washington Water Power Company v. *City of Spokane*, (Washington, 1916) 154 Pac. 329;

City of Los Angeles v. *Los Angeles Gas & Electric Corporation*, 251 U. S. 32, 64 L. ed. 121.

The order of the Corporation Commission of Oklahoma is a state law within the meaning of the federal constitution and laws of Congress regulating the appellate jurisdiction of this court over the state courts.

—*Lake Erie & Western Railway Company* v. *State Public Utilities Commission, et al.*, 249 U. S. 422, 63 L. ed. 684.

Both the order of the Corporation Commission of Oklahoma and the 1919 laws of Oklahoma, purporting to give that Commission the jurisdiction to make the order, are unconstitutional and void and violative of the constitutional rights, privileges and immunities of petitioner Railway Company, as herein set out.

—*Louisiana Public Service Commission* v. *Morgan's Louisiana & Texas Railroad and Steamship Company*, decided by this court April 7, 1924; same case below, 287 Fed. 398;

Allgeyer v. *State*, 165 U. S. 578, 41 L. ed. 832.

Further citation of authorities is not considered necessary here, but if this honorable court should grant this petition for *certiorari*, the questions involved will be more fully and thoroughly presented in such further briefs as this court may permit.

Respectfully submitted,

JOSEPH M. BRYSON,
CHARLES S. BURG,
MAURICE D. GREEN,
HOWARD L. SMITH,
Attorneys for Petitioners.

No. 205

In the Supreme Court of the United States

October Term, 1926.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, AND UNITED STATES FIDELITY AND GUARANTY COMPANY, *Plaintiffs in Error,*

VERSUS

THE STATE OF OKLAHOMA, AND THE CITY OF McALESTER, OKLAHOMA, *Defendants in Error.*

IN ERROR TO SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF OF PLAINTIFFS IN ERROR.

JOSEPH M. BRYSON,
CHARLES S. BURG,
MAURICE D. GREEN,
HOWARD L. SMITH,
Attorneys for Plaintiffs in Error.

SUBJECT INDEX.

Argument.

I.

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TABLE OF CASES—CONTINUED.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

No. 729

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, AND UNITED STATES FIDELITY AND GUARANTY COMPANY, *Plaintiffs in Error,*

vs.

THE STATE OF OKLAHOMA, AND THE CITY OF McALESTER, OKLAHOMA, *Defendants in Error.*

IN ERROR TO SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF *of* PLAINTIFFS *in* ERROR.

Grounds on Which the Jurisdiction of This Court Is Invoked.

Plaintiffs in error above named show to the court that this case is brought here by writ of error from the judgment of the Supreme Court of Oklahoma of December 11th, 1923 (R. 69), rehearing denied September 30th, 1924 (R. 94), the decision and opinion of the court not yet being officially reported, but found in 229 Pac. 172; said cause being an appeal by plaintiffs in error from an order of the Corporation Commission of Oklahoma dated June 16, 1922 (R. 64-6), by the terms of which order and decision of said court plaintiff in error, Railway Company, was ordered, directed and required to prepare a plan for a subway cross-

ing of Comanche Avenue across its premises in McAlester, Oklahoma, as prayed for by the City of McAlester in its petition (R. 9-11), together with an estimate of the cost thereof, and said Railway Company and said City were further ordered and directed to undertake to agree on an apportionment of the cost thereof, and said Railway Company was required to have said underpass crossing completed and opened for traffic within ninety days from the date said City should arrange to pay its proportion of the cost.

Plaintiffs in error contended then, and contend now, not only that Comanche Avenue had never been extended by condemnation proceedings or otherwise over the right of way and premises of the Railway Company at said proposed point of crossing (R. 14), but that a contract existed between said City and said Railway Company covered by Ordinance No. 74, passed and approved November 8th, 1901 (R. 48), by the terms of which it was agreed, among other things, that if said Comanche Avenue should ever be extended over said Railway Company's premises, it should be by an underpass crossing at the sole cost and expense of said city, in consideration of which and in consideration of other matters agreed to in said ordinance as to other street crossings, said Railway Company agreed to waive any and all claims for damages because of the opening and extending of said Comanche Avenue over its premises. At the hearing before the Corporation Commission the Railway Company, by its witness, Z. G. Hopkins, stated that it did not object to the opening of the crossing, if found necessary, and if opened pursuant to the provisions of contract Ordinance No. 74 (R. 35). The Corporation Commis-

sion, in its opinion and order, referred to the contract Ordinance No. 74, but held that under the statutes of Oklahoma then in effect it had full jurisdiction of the controversy, regardless of said ordinance (R. 64-5), and the Supreme Court of Oklahoma affirmed the said opinion and order without referring to the contract ordinance or the contentions of the Railway Company regarding same, that the Commission's order resulted in the taking of the Railway Company's property without due process of law and without compensation, and denied to it the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States, and denied to it the right of contract and impaired the obligation of contracts in violation of section 10, article I, of the Constitution of the United States, and that the Oklahoma statutes relied on, being sections 3491 to 3497, both inclusive, of the Complied Laws of Oklahoma, 1921, if construed to authorize the Commission's action, were unconstitutional and in violation of the Railway Company's constitutional rights as above stated; the Supreme Court holding that under the Oklahoma statutes above mentioned the Corporation Commission had the jurisdiction and power to make the order complained of, insofar as it required the Railway Company to participate in the cost of the construction of the subway crossing. The Supreme Court of Oklahoma did, however, hold that before the order of the Commission would become operative the City would have to acquire, by condemnation proceedings or otherwise, the right to extend Comanche Avenue crossing over the Railway Company's premises, and that the Railway Company would be entitled to compensation for its property taken therefor.

Plaintiffs in error invoke the jurisdiction of this court by writ of error under the provisions of section 237 of the Judicial Code, 36 Stat. 1156, as amended by Act of December 23, 1914, 38 Stat. 790; Act of September 6, 1916, 39 Stat. 726, and Act of February 17, 1922, 42 Stat. 366, the Supreme Court of Oklahoma being the highest court of the state in which a decision in the case could be had, and it is contended that this court's jurisdiction is sustained by the following authorities:

In *Chicago, B. & Q. R. Co.* v. *Nebraska, ex rel. City of Omaha*, 170 U. S. 57, 42 L. ed. 948, involving a somewhat similar controversy, but distinguished from this case on some features in that there was a pre-existing statutory duty of the Railway Company to construct the improvement, this court, on the jurisdictional question, said:

> "We have often had occasion to say that this court, when reviewing the final judgment of a state court upholding a state enactment alleged to be in violation of a contract clause of the constitution, possesses paramount authority to determine for itself the existence or the non-existence of the contract set up, and whether its obligation has been impaired by the state enactment. *Jefferson Branch Bank* v. *Skelly*, 66 U. S. 1 Black 436 (17:173); *Mississippi & M. Railroad Co.* v. *Rock*, 71 U. S. 4 Wall. 177 (18:381); *New Orleans Waterworks Co.* v. *Louisiana Sugar Ref. Co.*, 125 U. S. 18 (31:607); *Mobile & Ohio Railroad Co.* v. *Tennessee*, 153 U. S. 492 (38:796).
>
> "We shall proceed, therefore, to examine whether the statutes and ordinances to which the plaintiff in error points us constituted a contract within the protection of the Constitution of the United States, and whether such contract, if found to exist, has been impaired by the subsequent statute and the proceedings thereunder."

The order of the Corporation Commission of Oklahoma is a state law within the meaning of the Federal Constitution and laws of Congress regulating the appellate jurisdiction of this court over the state courts.

—*Lake Erie & Western R. Co.* v. *State Public Utilities Commission, et al.*, 249 U. S. 422, 63 L. ed. 684.

This court will determine for itself whether or not the contract ordinance relied on was a valid and binding contract between the parties hereto.

—*Georgia Railway & Power Co.* v. *Town of Decatur*, 262 U. S. 432, 67 L. ed. 1065.

The Railway Company's right of way and premises are within the protecting clause of the federal constitution.

—*United States* v. *Northern Pacific R. Co.*, 256 U. S. 51, 65 L. ed. 825.

The state court cannot ignore or fail to directly mention or pass on the federal constitutional questions involved, nor undertake to base its decision on non-federal grounds and thereby prevent plaintiffs in error from having the right of review by this court.

—*West Chicago Street R. Co.* v. *People*, 201 U. S. 506, 50 L. ed. 845;

Ward v. *Board of County Commissioners*, 253 U. S. 17, 64 L. ed. 751.

Statement of the Case and Matters Material to the Consideration of the Questions Presented.

The petition of the City, omitting caption and signatures, is as follows:

"Comes now the Incorporated City of McAlester, Oklahoma, petitioner herein, and complaining of the

Missouri, Kansas & Texas Railway Company and Chas. E. Schaff as its receiver operating its properties, respondents, says:

That the petitioner, the Incorporated City of McAlester, Oklahoma, is a municipal corporation and a city of the first class organized as such under the laws of the State of Oklahoma and laid out into city blocks, lots, streets and alleys, according to the official map and plat thereof approved by the Acting Secretary of the Interior, February 14, 1901, under authority of the laws of the United States; that it is also divided into six wards numbered First, Second, Third, Fourth, Fifth and Sixth Wards, with city public schools in each ward and a high school in the First Ward; that it has a population of over .... inhabitants, with residence and wholesale and retail business districts; with railroads and union passenger and freight depots, street car lines and interurban lines.

That Comanche Avenue is one of the public streets and highways of said City of McAlester appearing on said map and plat of said City and extends in an east and west direction from the Second Ward to the Third Ward of said City, and that the city public school of the Third Ward is located thereon, and that the Second and Third Wards contain a large population, rendering free and unobstructed passageway along said Comanche Avenue highly necessary to the convenience and necessities of the residents of said wards of said City.

That the said Missouri, Kansas & Texas Railway Company is a steam railway, and that said Chas. Schaff is the receiver of its properties, operating the same, and that the said steam railway, in passing through the City in a north and south direction, separates the Second Ward lying on its east, from the Third Ward, lying on the west line thereof, and that said Comanche Avenue crosses the right of way of said railway company, but that at the point of its intersection therewith there exists a very high embankment, upon the top of which is situated the tracks and roadbed of the said

railway line, by reason whereof said Comanche Avenue is completely closed and obstructed at said point.

That the City Council of the said City of McAlester, Oklahoma, on September 19, 1921, enacted and passed a resolution declaring the necessity for a crossing upon, over or under the track, road bed and right-of-way of said Missouri, Kansas & Texas Railway Company where said Comanche Avenue intersects therewith, and by said resolution directed that application be made to said Corporation Commission for an order requiring said Missouri, Kansas & Texas Railway Company and said Chas. E. Schaff, its receiver operating its properties, to construct and maintain a public highway crossing at said intersection, a copy of said resolution being hereto attached and made a part hereof and marked Exhibit 'A.'

Wherefore, the premises considered, the petitioner, the Incorporated City of McAlester, Oklahoma, prays that an order be made and entered by the Corporation Commission requiring said Missouri, Kansas & Texas Railway Company and its said receiver, Chas. E. Schaff, to construct and maintain at its and his cost and expense a public highway crossing at the said intersection of said Comanche Avenue with said steam Railway Company in such manner as to open the same for passageway and travel by pedestrians and vehicles along and over said Comanche Avenue." (R. 9.)

Exhibit "A" to the petition, is the resolution attached to the petition, and by which the city manager and city attorney were authorized to file the petition and make application for the order (R. 11).

Under the state procedure before the Corporation Commission it was not necessary and the Railway Company did not file any pleading.

EVIDENCE.

Testimony on Behalf of the City.

ROSE EWENS, city clerk, testified as to the passing of the resolution above mentioned, which was attached to the City's petition (R. 13). The other witnesses for the city (R. 15-31) testified as to the public necessity for the opening of Comanche Avenue across the Railway Company's premises.

Evidence on Behalf of Railway Company.

ROSE D. EWENS, city clerk, testified as to the correctness of Ordinance No. 74 (R. 32), and the acceptance thereof by the Railway Company, the Railway Company's "Exhibit 5" (R. 48), which ordinance and acceptance read as follows:

"ORDINANCE No. 74.

An Ordinance to provide for street crossings across the right-of-way, station grounds and tracks of the Missouri, Kansas & Texas Railway Company, in the City of South McAlester, upon the lines of certain streets as laid out by the Townsite Commission's surveys in lieu of other crossings now in use, and which, upon completion of the new crossings herein provided for, shall be vacated and closed; and for other purposes;

Be It Ordained by the Council of the City of South McAlester:

Section 1. That Monroe Avenue, Grand Avenue, Delaware Avenue, and Miami Avenue, shall be and hereby are opened across and over the right-of-way, station grounds and tracks of the Missouri, Kansas & Texas Railway Company, in the City of South McAlester by grade crossings at Monroe and Miami Avenues,

and by an overgrade crossing at Grand Avenue, and by an undergrade crossing of the main and passing tracks at Delaware Avenue, and by a grade crossing of the side tracks now constructed, and those hereafter to be constructed at Delaware Avenue, all as hereinafter provided:

Section 2. The expense of constructing said grade crossings at Monroe and Miami Avenues shall be borne by the Missouri, Kansas & Texas Railway Company, and said crossings shall be constructed by said Railway Company, plank in its tracks on the inside by planks thirty feet long and three inches thick, and one plank on the outside of its rails of the same length and thickness.

Section 3. The overhead crossing at Grand Avenue shall be by a two span iron bridge, resting on two abutments and one pier upon the right-of-way or grounds of the said Railway Company, according to plans to be prepared by the City, but subject to the approval of the said Railway Company.

Section 4. The crossing at Delaware Avenue shall be by planking the side tracks, as in section two (2) hereof, and by an ordinary dirt road under bridge number three hundred and twenty-six (326) of the said Railway Company, and between the bents on the north side of the present water way, the grade of said undergrade crossing to be about six feet above the bed of the present water course.

Section 5. In consideration of the Missouri, Kansas & Texas Railway Company agreeing to the opening of said streets across its said right-of-way, station grounds and tracks aforesaid, and its paying for the construction of said grade crossings at Monroe and Miami Avenues as in section two herein provided, and its agreeing to the erection and maintenance of said bridge across its said right-of-way, station grounds and tracks at Grand Avenue, as aforesaid, and its further

agreement to furnish, in the first instance the necessary material and labor for constructing said Grand Avenue bridge for the City, as well as the necessary labor and material for opening the crossing at Delaware Avenue, as in section four hereof provided, and its further agreement to contribute to the City one-half of the actual cost of said Grand Avenue bridge and said crossing at Delaware Avenue, the City hereby agrees to vacate and forever close the present grade crossing over the railway company's tracks at or near the alley shown on the townsite commission's map, and lying between Grand Avenue and Choctaw Avenue, and extending through block number three hundred and fifty-one (351), and also to vacate and close all other crossings over said railway company's tracks, except those herein provided for, and upon the completion of said crossings herein provided for, all other crossings including the present grade crossings between Grand Avenue and Choctaw Avenue, shall be and hereby are vacated and closed; and the city further agrees that it will hereafter open no other street crossings or alleyways over, across or under the right-of-way, station grounds and tracks of the said Railway Company, except and provided it shall pay to the said Railway Company, as agreed, stipulated and liquidated damages in any proceedings instituted by the said City for the opening or condemnation of a right-of-way over, across or under the right-of-way, station grounds and tracks of the said Railway Company, any judgment, finding, verdict or assessment of damages of any court, jury, commission or other tribunal at the time having authority to assess said damages to the contrary notwithstanding, and whether for more or less than the agreed sum, namely:

Should Choctaw Avenue be opened over, across or under the right-of-way, tracks and station grounds of the Railway Company, the City shall pay the said Railway Company, as agreed, stipulated and liquidated damages, in the sum of twenty thousand dollars ($20,000.00);

Should any other crossing, alleyway or street be opened across the Railway Company's premises through block number three hundred and fifty-one (351), the City shall pay to the Railway Company, as agreed, stipulated and liquidated damages the sum of fifteen thousand dollars ($15,000.00);

Should any other street or alleyway except Washington Avenue or Comanche Avenue, be opened across, over or under the right-of-way, station grounds and tracks of the Railway Company the City shall pay to the said Railway Company as agreed, stipulated and liquidated damages, the sum of ten thousand dollars ($10,000.00) for each and every other of said crossings, and in addition thereto, damages equal to the actual value of any buildings or other improvements of the Railway Company damaged or destroyed by the opening of any street or crossing; provided that nothing herein contained shall constitute a waiver on the part of the Railway Company to contest the opening of any additional streets other than those herein provided for.

Section 6. The City of South McAlester shall and hereby agrees to pay to the said Missouri, Kansas & Texas Railway Company one-half of the actual cost of the construction of said Grand Avenue and Delaware Avenue crossings, as above provided for, when and as soon as the City of South McAlester has the lawful right to collect from the said Missouri, Kansas & Texas Railway Company, taxes levied against its right-of-way, buildings and other improvements or property in the City of South McAlester, in annual installments equal to the amounts of the taxes that may be collected by the said City from the said Railway Company as taxes until said annual installments or sums so paid by the said City of South McAlester to the said Railway Company shall equal one-half of the actual cost of the said Grand Avenue and Delaware Avenue crossings; provided that upon the completion of said crossings the said Railway Company shall render to the City

a bill showing the actual cost of said crossings, and the proportion thereof so to be paid by the City.

Section 7. It is understood and agreed, however, that, if at any time, after five years from the date of the passage of this ordinance, the City of South McAlester shall desire an undergrade crossing at Cherokee Avenue, and the crossing at Delaware Avenue herein provided for shall be vacated and closed, that the Railway shall consent that said undergrade crossing at Cherokee Avenue shall be constructed, and contribute towards the construction thereof, one-half of the actual cost thereof, provided said crossing can be constructed at a cost of not to exceed seven thousand and five hundred dollars ($7500.00) but should said crossing cost more than seven thousand and five hundred dollars ($7500.00) then said Railway Company shall in additon thereto, contribute the entire cost of said crossing over and above the sum of three thousand and seven hundred and fifty dollars ($3750.00) which is to be the maximum sum paid by the City. And said crossing at Cherokee Avenue shall be made by planking the side tracks as provided in section two hereof, and by an ordinary dirt road under the main and other tracks of said road built upon the top of the fill of said road, and above the present grade of said Cherokee Avenue. The proportion of the cost of said Cherokee Avenue crossing to be paid by the City in annual installments in the manner provided in section six of this ordinance, for other crossings; but the amount to be paid by the City in any one year to said Railway Company on account of the construction of said crossing not to exceed the amount of taxes so as hereinabove provided, to be paid in any one year by said Railway Company to the City. *Provided*, however, that should Delaware Avenue ever be closed, as herein provided, the City of South McAlester shall have the right to pass its sewer pipes under the tracks of the said Railway Company at the place herein provided for Delaware Avenue crossing said right-of-way, and the said Railway Company shall have the right to connect

its sewers with the said sewers of the City of South McAlester at any point where said sewers shall cross through said right-of-way of said Railway Company, under plans and specifications to be approved by the said Missouri, Kansas & Texas Railway Company, and *provided further*, that it is hereby understood and agreed that should the City of South McAlester desire to construct such crossing at Cherokee Avenue across the right-of-way of said Railway Company, at any time, prior to the five years from the date of the passage of this ordinance, it may do so, at its sole expense, under plans and specifications to be approved by the said Railway Company.

Section 8. The overgrade bridge crossing at Grand Avenue shall be and remain the exclusive property of the City of South McAlester.

Section 9. It is hereby understood and agreed that if at any time in the future, the City of South McAlester shall desire to open and establish a crossing of Comanche Avenue or Washington Avenue, or both of them, across the right-of-way and station grounds of the said Railway Company that it may do so upon the following terms: the crossing at Comanche Avenue shall be constructed as an undergrade crossing under the main and other tracks of the said Railway Company located upon the fill of said Company, and above the present grade of Comanche Avenue, and a grade crossing over any side tracks of the said Railway Company that now exist or that may be hereafter established upon the grade of said Comanche Avenue; and the crossing at Washington Avenue shall be an overhead bridge crossing, and both of said crossings, at Comanche Avenue and Washington Avenue, shall be constructed upon plans and specifications to be approved by the said Railway Company, and at the sole cost and expense of the said City of South McAlester. The Railway Company hereby agreeing in consideration of the other matters and things expressed in this ordinance, to

waive any and all claims for damages because of the opening and establishing of either or both of said Comanche and Washington Avenue crossings. And it is further understood and agreed that the said overgrade bridge if it shall be built at Washington Avenue, shall be and remain the exclusive property of the City of South McAlester.

Section 10. This ordinance shall be in full force and effect from and after its passage and publication, and the written acceptance of the same on the part of the Missouri, Kansas & Texas Railway Company, acting through its vice president and general manager, has been filed with the clerk of the City of South McAlester.

Passed and approved this 8th day of November, 1901.

FIELDING LEWIS, *Mayor.*

A. A. POWE, *City Clerk.*

The above entitled Ordinance, number 74, entitled 'An Ordinance to provide for street crossings across the right of way, station grounds and tracks of the Missouri, Kansas & Texas Railway Company in the City of South McAlester, upon the lines of certain streets as laid out by the townsite commission's survey in lieu of other crossings now in use, and which, upon the completion of the new crossings herein provided for, shall be vacated and closed, and for other purposes,' passed by the council and approved by the Mayor of the City of South McAlester, on the 8th day of November, A. D. 1901, hereby accepted by the said Missouri, Kansas & Texas Railway Company, and this acceptance is endorsed upon the original ordinance and is to be filed with the clerk of the City of South McAlester in accordance with section 10 of said ordinance.

Missouri, Kansas & Texas
Railway Company,

By A. A. ALLEN,

Its Vice President & General Manager."

The witness then identified resolutions numbers 1, 2, 3 and 4, passed and approved by the City authorities in April, 1909, and which were offered for the purpose of showing that the City had actually ratified and lived up to the old contract Ordinance No. 74 since its passage and approval (R. 33).

These resolutions will not be quoted in full in this brief, but are found at pages 45 to 47 of the record, and cover the agreements of the City to pay and the actual payment of the various amounts by the City to be paid on the crossings constructed under the old contract Ordinance No. 74, including Delaware Avenue, Grand Avenue and Cherokee Avenue crossings.

The Railway also introduced in evidence the record in the case of *Missouri, Kansas & Texas Railway Company* v. *City of McAlester*, being friendly suit in the Superior Court at McAlester, Oklahoma, by which the Railway recovered judgment against the City for the balance due under contract Ordinance No. 74 covering the City's part of the cost of the street crossings in question, the date of the judgment being April 17, 1912 (R. 53).

Z. G. HOPKINS, called on behalf of the Railway, testified substantially as follows: So far as the opening of an undergrade crossing at Comanche Avenue is concerned, the Railway would not object to it if it is opened in conformity with contract Ordinance No. 74, which we consider is a contract made by the Railway and the City and carried out in good faith on our part. However, the opening of such crossing without the lowering of our tracks as we go south and reduction of the grades, would necessitate raising the track at Comanche Avenue and the points between there

and Delaware, which, until such time as our grade is reduced, would be a disadvantage to us because we have a very difficult grade situation at this point. Our own plans, independent of the proposed Comanche Avenue crossing, contemplate a reduction of that grade sometime, we hope, in the near future, depending on our financial situation. Aside from this and from an engineering standpoint, it is feasible, in the opinion of our chief engineer, to construct a reinforced concrete girder or probably twenty-four feet clear span to carry our tracks over the roadway. It would probably also be necessary to lower certain of our industry tracks and raise the main line tracks and the estimate of the total expense would be in excess of $28,000.00 and the opening of the undergrade crossing would be of no benefit to us unless it carried with it the elimination of grade crossings such as Ottawa.

It is possible that at a relatively small expense, as compared to grade separation at Comanche Avenue, a satisfactory crossing could be secured at Delaware. It has two 24-foot spans. It is not paved, but could be paved, and railings could be provided (R. 34-38).

Cross Examination.

My estimate of $28,000.00 was exclusive (inclusive) of the other changes necessary, such as the raising of the grade and the lowering of the industry tracks. I am unable to say what portion of that sum covers the cost of raising the grade. Approximately $18,000.00 would cover the cost of the structure to carry the tracks. The other portion would be raising the grade and lowering the industry tracks and paving. We have made no detailed plan for the crossing. The result of the investigation of our chief engineer is that

it will be necessary to raise the grade in order to provide an underhead crossing of Comanche Avenue, and my observation on the ground would seem to me to make it necessary. That is a matter for the engineers (R. 38-45).

The Corporation Commission's order of June 16, 1923 (R. 64), need not be considered in its entirety, but the following portion is important:

> "A copy of the City Ordinance No. 74 was presented showing an agreement between the City of McAlester and the M., K. & T. Railway in the City of McAlester. This ordinance was passed by the City on the 8th day of November, 1901, which provided for certain crossings and how the City could acquire other crossings, and provided for Comanche Avenue crossings, to-wit:
>
> > 'Should any other street or alleyway except Washington or Comanche Avenue, be opened across, over or under the right of way, station grounds, and tracks of the Railway Company, the City shall pay to the said Railway Company as agreed, stipulated and liquidated damages, the sum of ten thousand dollars ($10,000.00) for each and every other of said crossings, and in addition thereto damages equal to the actual value of any buildings or other improvements of the Railway Company damaged or destroyed by the opening of any street or crossing; provided that nothing herein contained shall constitute a waiver on the part of the Railway Company to contest the opening of any additional streets other than those herein provided for.'
>
> The Railway Company filed brief covering the above stipulation, contending that the Commission was without jurisdiction in reference to this application, setting forth various decisions. The Commission interprets the 1919 Session Laws to give them full jurisdiction over highway crossings where highway passes over

or under, or at grade of steam or electric railroads or railways.

The evidence disclosed that the crossing asked for is essential; that the Katy south from the Rock Island crossing is on a high fill for a major portion of the distance in the corporate limits. The topography in the vicinity of the proposed crossing makes Comanche Avenue the most practicable route to and from the business district of McAlester, especially from the south half of the City; that the present highways in the vicinity of Comanche are inadequate and hazardous and are located, to-wit: From Comanche Boulevard, Delaware Avenue is located 1569½′ north. This crossing is an underpass and takes care of the drainage from Sand Creek and the sewerage from the City. The nearest crossing south of Comanche Avenue is on Ottawa Avenue. It is a grade crossing and is located 730.5′ south of Comanche Avenue. If Comanche Avenue was provided it would be of material benefit for east and west traffic, and especially to residents living in the southwest portion of the City.

The Commission, after giving all facts due consideration and realizing the necessity of grade separation where same is practical, *it is therefore ordered*, that the M., K. & T. Railway Company prepare a plan for reinforced concrete subway on Comanche Avenue as prayed for by applicants, the plan to provide for two openings of not less than 14′ horizontal and 12′ vertical clearance, together with an estimated cost showing quantities. The plan for underpass to show the location of drainage and industrial tracks, the track to conform to highway grade on Comanche Avenue. The above estimate and plan is to be filed with the Mayor of McAlester and the Corporation Commission on or before August 15, 1922.

It is further ordered, that on the failure of the M., K. & T. Railway Company and the City of McAlester to agree on the apportion of cost in the construction

of underpass on Comanche Avenue, the Commission will hear further evidence covering the division of cost or change in plan, the date to be set when the applicants or defendants advise the Commission that they are unable to agree as to the division of cost.

It is further ordered, that the M., K. & T. Railway Company shall have the underpass on Comanche Avenue in the City of McAlester constructed and opened for traffic within 90 days from the date the City of McAlester has arranged to pay their apportion of cost of constructing the subway.

Done at Oklahoma City, Oklahoma, this 16th day of June, 1922."

It will be noted that the Commission's above order quotes a part of section 5 of the contract ordinance as applying to Comanche Avenue, whereas section 9 thereof is the applicable provision.

Syllabi 1 to 4, both inclusive, of the opinion of the Supreme Court of Oklahoma (R. 69) will suffice to show the decision of that court:

"1. *Constitutional Provisions.* The various sections of article 9 of the constitution create the Corporation Commission, confer and define certain duties and powers, and vest it with certain specific jurisdiction, and section 19, *Id.*, after conferring certain jurisdiction upon the Corporation Commission to control corporations within the state, provides:

> 'The Commission may be vested with such additional powers and charged with such other duties * * * as may be prescribed by law.'

2. *Statutory Provisions.* Pursuant to the power conferred upon it by the above constitutional provision, the legislature, by chapter 15, Comp. Stat., 1921, vested the Corporation Commission with additional juris-

diction and powers and charged it with additional duties, among which is as follows:

> 'The Corporation Commission is given full jurisdiction over all public highway crossings, where same cross steam or electric railroads or railways within the State of Oklahoma.' Section 3491.

3. *Railroads. Corporation Commission May Order Construction of Highway Crossings.* Under the foregoing section, in connection with other sections of chapter 15, Comp. Stat., 1921, the Corporation Commission has full jurisdiction over all public highway crossings and has authority to order such crossings to be constructed, as it may be petitioned by proper authorities to do, and authority to make an estimate of the cost of construction of such crossings and to assess the cost of same against the petitioners and the Railroad Company, according to its sound discretion and judgment, and to enforce, as provided by law, its orders for the construction of same.

4. *Constitutional Provisions.* Article 2, section 24, of the constitution provides specifically: 'Private property shall not be taken or damaged for public use without just compensation.' Hence, where a railroad company owns the fee in its right of way, such right of way cannot be appropriated or damaged for public use without compensation, either by amicable settlement or by proper condemnation proceedings."

SPECIFICATIONS *of* ERROR.

I.

The Corporation Commission of Oklahoma and the Supreme Court of Oklahoma erred in holding and deciding that the Commission had jurisdiction and authority to impose upon the plaintiffs in error any requirements or conditions other than or different from those contained in the contract Ordinance No. 74 (assignment of error 1, R. 3).

II.

The Corporation Commission of Oklahoma and the Supreme Court of Oklahoma erred in holding and deciding that the plaintiffs in error could lawfully be ordered and directed to prepare plans for the undergrade crossing, with an estimated cost thereof, and to undertake to agree with the City of McAlester on an apportionment of the cost and to report to the Commission any failure to agree, to the end that further hearing might be had covering a division of the cost between the Railway Company and the City, and to construct said crossing, same constituting a taking of plaintiff in error's property without due process of law and without compensation and denying to them the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States (assignment of error 1, R. 3).

III.

The Corporation Commission and the Supreme Court of Oklahoma erred in holding and deciding that the plaintiffs in error could lawfully be ordered and directed to prepare plans for the undergrade crossing, with an estimated

cost thereof, and to undertake to agree with the City of McAlester on an apportionment of the cost and to report to the Commission any failure to agree, to the end that further hearing might be had covering a division of the cost between the Railway Company and the City, and to construct said crossing, same in effect denying plaintiffs in error the right of contract, and impairs the obligation of contracts in violation of section 10, article I of the Constitution of the United States (assignment of error 2, R. 4).

IV.

The Corporation Commission of Oklahoma and the Supreme Court of Oklahoma erred in holding and deciding that the Commission had jurisdiction and power under sections 3491 to 3497, Compiled Laws of Oklahoma, 1921, to make the order complained of and that said statutes were valid and constitutional and were not repugnant to the Constitution of the United States or in contravention thereof and did not result in the taking of plaintiffs in error's property without due process of law, or compensation, or deny to them the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States and deny to them the right of contract, or impair the obligation of contracts, in violation of section 10, article I, of the Constitution of the United States (assignment of error 3, R. 5).

ARGUMENT.

I.

The order of the Corporation Commission and decision of the Supreme Court of Oklahoma are contrary to and in conflict with the contract Ordinance No. 74 and void and deny plaintiffs in error the right of contract and impair the obligation of contracts, in violation of section 10, article I of the Constitution of the United States, and take plaintiffs in error's property without due process of law and without compensation and deny them the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States. *(Specifications of Error I, II and III.)*

SUMMARY OF ARGUMENT UNDER SUB-HEAD I.

(a) Statement of issues and relative rights and powers of City and Railway Company and validity of contract.

AUTHORITIES.

Act of Congress of June 28, 1898.

Act of Congress of July 25, 1866, 14 Stat. 36.

Missouri, K. & T. R. Co. v. *Roberts,* 152 U. S. 114, 38 L. ed. 377.

New Mexico v. *United States Trust Co.,* 172 U. S. 171, 43 L. ed. 407.

St. Louis & S. F. R. Co. v. *Love,* 29 Okl. 523, 118 Pac. 259.

Mansfield's Digest of the Statutes of 1884.

Act of Congress of May 2, 1890, 26 Stat. 81.

28 Cyc 634-5-6.

Dillon's Municipal Corporations, (4th ed.) Vol. 1, p. 512.

Elliott on Contracts, Vol. 1, Sec. 601.

15 Cyc 821.

Florida East Coast R. Co. v. *City of Miami,* 79 Sou. 682.

Butchers' Union S. H. & L. S. L. Co. v. *Cresent City L. S. L. & S. H. Co.,* 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652.

Secs. 3491-2-3-4-5, Oklahoma Compiled Statutes, 1921.

Morgan's Louisiana, etc., R. Co. v. *Louisiana Public Service Commission,* 287 Fed. 390.

Louisiana Public Service Commission v. *Morgan's Louisana, etc., R. Co.,* 264 U. S. 393, 68 L. ed. 756.

A. T. & S. F. R. Co. v. *Shawnee,* 183 Fed. 85, 105 C. C. A. 377.

V. S. & P. R. Co. v. Monroe, 48 L. Ann. 1102, 20 Sou. 664.

City of Argentine v. *Atchison, T. & S. F. R. Co.,* 41 Pac. 946.

Hicks v. *Chesapeake & O. R. Co.,* 45 S. E. 888.

Noble v. *City of Richmond,* 31 Grat. 271, 31 Am. Rep. 726.

(b) City has continually ratified contract.

(c) City is estopped from repudiating contract.

AUTHORITIES.

State, ex rel. City of Carthage, v. *Cowgill & Hill Mill Company,* 55 S. W. 1008.

Elliott on Contracts, Vol. 1, Sec. 615.

First National Bank of Red Oak v. *City of Emmetsburg,* 138 N. W. 451.

(d) Contract is a business contract.

AUTHORITIES.

Elliott on Contracts, Vol. 1, Sec. 603.

Elliott on Contracts, Vol. 1, Sec. 615.

City of Tulsa v. *Oklahoma Natural Gas Co.*, 4 Fed. (2d) 399.

Mansfield's Digest, Ark., Secs. 749, 754, 755.

Los Angeles v. *Los Angeles Gas & Elec. Corp.*, 251 U. S. 32, 64 L. ed. 121.

(e) Contract is not *ultra vires* and city cannot be heard to so contend.

AUTHORITIES.

Atlas Life Ins. Co. v. *Board of Education of the City of Tulsa*, 200 Pac. 171.

Hitchcock, et al., v. *City of Galveston*, 96 U. S. 341, 24 L. ed. 659.

Washington Water Power Co. v. *City of Spokane*, 154 Pac. 329.

(f) Rights under the contract have vested.

AUTHORITIES.

Schedule to Constitution of Oklahoma, Sec. 1.

Crump v. *Guyer, et al.*, 60 Okl. 222, 157 Pac. 321.

State v. *Julow*, 31 S. W. 781, 29 L. R. A. 257, 50 Am. St. Rep. 443.

Enid City Railway Company v. *City of Enid*, 43 Okl. 778, 144 Pac. 617.

Elliott on Contracts, Vol. 3, Secs. 2725, 2729 and 2763.

(a) *Statement of issues and relative rights and powers of City and Railway Company and validity of contract ordinance.*

As heretofore stated in this brief, this is a proceeding begun by the City of McAlester, Oklahoma, before the Corporation Commission of Oklahoma, to require the plaintiff in error Railway Company to construct at its own expense a subway crossing of Comanche Avenue over its premises

in said city and which resulted in an order of the Commission, affirmed by the Supreme Court, requiring the Railway Company to prepare plans and estimates of costs for such crossing and to undertake to agree with the city on a division of such cost, and to complete such crossing within a specified time, all of which was contrary to and in violation of the contract represented by Ordinance No. 74, passed and approved and accepted long prior to the time of the order of the Commission and the decision of the Supreme Court, and prior to the enactment of the Statute of 1919 by the Legislature of Oklahoma, under which the Commission's order was made and affirmed by the Supreme Court, and by which contract ordinance it was agreed that if such crossing were ever constructed, it would be at the sole cost and expense of the city.

The city is a duly laid out and platted government townsite having been so laid out and platted in the Choctaw Nation in the Indian Territory by the Government Townsite Commission, acting under the Secretary of the Interior pursuant to authority given in the Act of Congress of June 28, 1898, entitled "An Act for the Protection of the People of the Indian Territory, and for Other Purposes."

The Railway Company's right of way and premises were acquired through the Indian Territory and through said City by a land grant Act of Congress of July 25, 1866, 14 Stat. 36, the road being therein named as the Union Pacific Railroad Company, Southern Branch, and the road was constructed through said Indian Territory and said City in 1872-3. The Railway Company therefore has a fee title to its premises, or at least a qualified fee.

—*Missouri, Kansas & Texas R. Co.* v. *Roberts,* 152 U. S. 114, 38 L. ed. 377;

New Mexico v. *United States Trust Co.*, 172 U. S. 171, 43 L. ed. 407;

St. Louis & S. F. R. Co. v. *Love*, 29 Okl. 523, 118 Pac. 259.

The Supreme Court of Oklahoma, without deciding, but ignoring the contentions of the plaintiffs in error regarding their rights under contract Ordinance No. 74, did, however, hold that before the order of the Corporation Commission would become operative, the City would first have to acquire the right to a crossing by condemnation proceedings or otherwise.

It was the position of the plaintiffs in error that under the contract Ordinance No. 74, while the Railway Company had the right to contest the necessity for the extension of Comanche Avenue over its premises, yet if it should finally be extended, then under its contract with the city, covered by Ordinance No. 74, passed and approved on November 8, 1901, the city was obligated to bear the entire expense of such crossing.

It will be noted from this ordinance that it was passed by the city authorities and accepted in writing by the Railway by its then Vice President and General Manager, Mr. A. A. Allen, with the view of providing by contract for such street crossings over the railway premises as were then deemed necessary, and for the terms under which any street crossings which might in the future be legally extended over its premises should be constructed and maintained. Section 1 of the Ordinance provides for the immediate opening of certain crossings, some at grade, some by overgrade and some by undergrade crossings, and the subsequent sections provide for the manner of construction, the waiver of dam-

ages by the Railway and the division of the expense of construction of the crossings then agreed to be opened, as well as of future crossings, and in the last part of section 5 the Railway reserves the right to contest the opening of all crossings not provided for by section 1, the language of this reservation being as follows:

> "* * * *Provided*, that nothing herein contained shall constitute a waiver on the part of the Railway Company to contest the opening of any additional streets other than those herein provided for."

The Corporation Commission, in its Final Order No. 2071, from which this appeal is taken, by mistake quoted another part of section 5 of the Ordinance as applying to the matter in controversy in this connection, being that of the opening of Comanche Avenue. The provision which does cover the opening of Comanche Avenue is contained in section 9 of the Ordinance, which reads in full as follows:

> "*Section 9.* It is hereby understood and agreed that if at any time in the future the City of South McAlester shall desire to open and establish a crossing of Comanche Avenue or Washington Avenue, or both of them, across the right of way and station grounds of the said railway company, that it may do so upon the following terms: the crossing at Comanche Avenue shall be constructed as an undergrade crossing under the main and other tracks of the said Railway Company located upon the fill of said Company, and above the present grade of Comanche Avenue, and a grade crossing over any side tracks of the said Railway Company that now exist or that may be hereafter established upon the grade of said Comanche Avenue; and the crossing at Washington Avenue shall be an overhead bridge crossing, and both of said crossings at Comanche Avenue and Washington Avenue shall be constructed upon plans and specifications to be approved by the

said Railway Company, and at the sole cost and expense of the said City of South McAlester. The Railway Company hereby agreeing, in consideration of the other matters and things expressed in this ordinance, to waive any and all claims for damages because of the opening and establishing of either or both of said Comanche and Washington Avenue crossings. And it is further understood and agreed that the said overgrade bridge, if it shall be built at Washington Avenue, shall be and remain the exclusive property of the City of South McAlester." (R. 51.)

It will therefore be seen that while the Railway reserves the right to contest the opening of Comanche Avenue, yet if it should ever be legally opened, then the construction of same across the railway premises should be by an undergrade crossing under the main and other tracks on the railway embankment and a grade crossing over the side or industry tracks and on plans to be approved by the Railway, but at the sole cost and expense of the City, the Railway waiving all claims for damages in consideration of the matters therein contained.

At the time this ordinance was passed and approved, the city existed as a city of the Indian Territory under the laws of Arkansas as contained in Mansfield's Digest of the Statutes of 1884, which were extended over the Indian Territory by Act of Congress of May 2, 1890, 26 Stat. 81, and the following are portions of said Arkansas laws so extended over and in force in the Indian Territory at the time said Ordinance was passed:

"*Sec. 749.* Cities or incorporated towns, organized or to be organized under the provisions of this act, shall be, and are hereby declared to be bodies politic and corported, under the name and style of 'the city

of ....,' or 'the incorporated town of ....,' as the case may be; capable to sue and be sued, to contract and be contracted with, to acquire, hold and possess, property real and personal; to have a common seal, and to change and alter the same at pleasure, and to exercise such other powers and to have such other privileges as are incident to other corporations of like character or degree, not inconsistent with the provisions of this act or the general laws of the state."

"*Sec. 760.* They shall have power to lay off, open, widen, straighten and establish, to improve and keep in order and repair, and to light streets, alleys, public grounds, wharves, landing places and market places; to open and construct and keep in order and repair sewers and drains (j); to enter upon, or take, for such of the above purposes as may be required, land or material, and to assess and collect a charge on the owner or owners of any lot or land, or on lots or lands through or by which a street, alley or public highway shall pass, for the purpose of defraying the expenses of constructing, improving, repairing or lighting such street, alley or public highway, to be in proportion to the value of such lot or land as assessed for taxation under the general law of the state."

"*Sec. 764.* Municipal corporations shall have power to make and publish, from time to time, by-laws or ordinances, not inconsistent with the laws of the state, for carrying into effect or discharging the powers or duties conferred by the provisions of this act. * * *"

"*Sec. 907.* When it shall be deemed necessary by any municipal corporation to enter upon or take private property for the construction of wharves, levees, parks, squares, market places or other lawful purposes, an application in writing shall be made to the Circuit Court of the proper county or to the judge thereof in vacation, describing as correctly as may be the property to be taken, the object proposed, and the name or names of the owner or owners, and of each lot or par-

eels thereof known; notice of the time and place of such application shall be given, either personally in the ordinary manner of serving process or by publishing a copy of the application, with a statement of the time and place at which it is to be made, for three weeks next preceding the time of application, in some newspaper of general circulation in the county. If it shall appear to the court or judge that such notice has been served ten days before the time of application, or has been published as provided, and that such notice is reasonably specific and certain, then the court or judge may set a time for the inquiry into and assessment of compensation by a jury before said court or judge."

It will be noted that by these statutes the City was given the power to contract and be contracted with; to lay off and establish public streets, to acquire property therefor and to pass ordinances for carrying into effect or discharging its powers and duties.

It is a general rule of law that the city has power to enter into any contract and to incur any debt necessary to enable it to carry out the particular powers expressly or impliedly conferred upon it, and to adopt all ordinary and usual means necessary to the full execution and enjoyment of such powers. See 28, Cyc 634-5-6; Dillon's Municipal Corporations (4th ed.), Vol. 1, p. 512; see, also, Elliott on Contracts, Vol. 1, Sec. 601, reading in part as follows:

"It is thus made to appear that the powers of a municipal corporation are either express or implied. It possesses not only the powers specifically conferred upon it by its charter, but also such as are necessarily incident to or may fairly be implied from those powers, including all that are essential to the declared object of its existence. The implied power resident in a municipal corporation, is the power necessarily incident

to the exercise of those powers expressly granted and directly and immediately appropriate to their exercise."

The City had the above statutory power to condemn for street crossings, and it had the power to contract therefor, and agree on the compensation therefor, or, in other words, to make this contract, by the terms of which it acquired the right to the various street crossings therein referred to, and the Railway Company waived all claim for damages by reason thereof, and the City agreed to bear certain expenses, including that of the construction of Comanche Avenue crossing now in controversy in this case. Many condemnation statutes provide that an effort at an amicable agreement shall be made as a condition precedent to exercising the right of eminent domain. (15 Cyc 821.) And an agreement such as the one in this case is not in violation of the rights of eminent domain, or the police power, but is in reality in furtherance thereof, as was well said by the Supreme Court of Florida in *Florida East Coast R. Co.* v. *City of Miami,* (1918) 79 Sou. 682, where a similar controversy was determined in favor of the validity of the contract ordinance, and the contentions of the railway company upheld, and in which case that court said:

"We are next confronted with the question whether the city, in contracting to operate the crossing without expense to the railway company, was abdicating the police power of the municipality and its act was illegal and void. The protection of public health, public morals, and public safety is a duty which the state owes to its inhabitants, and they have authorized it to do such things as are necessary for the performance of this duty; it is a sacred trust, and the police power is derived from the necessities of its execution. It is well

settled that the state cannot devest itself, by contract or otherwise, of its police power, but we do not think the case presented here has that aspect. The fallacy in the contention of appellee grows out of its conception of the police power, as the means of paying for protection, rather than protection itself, thus making the payment the main purpose, and public health, morals, and safety, mere incidents.

"We think there is a clear distinction between a contract by the state in reference to a matter within reach of the police power and a contract to suspend or devest itself thereof.

"The Supreme Court of the United States has indicated that it recognizes the distinction in this language: 'While we are not prepared to say that the legislature can make valid contracts on no subject embraced in the largest definition of the police power, we think that, in regard to two subjects so embraced, it cannot, by any contract, limit the exercise of those powers to the prejudice of the general welfare. These are the public health and public morals. The preservation of these is so necessary to the best interests of social organization that a wise policy forbids the legislative body to devest itself of the power to enact laws for the preservation of health and the repression of crime.' *Butchers' Union S. H. & L. S. L. Co.* v. *Crescent City L. S. L. & S. H. Co.*, 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652.

"It is worthy of note that Mr. Justice MILLER drew a distinction between contracts affecting 'public health and public morals' and those affecting 'public safety,' and that, while he condemned contracts which limited the exercise of the power to protect public health and public morals, to the prejudice of the general welfare, the question of a state obligating itself for a valuable and sufficient consideration to pay certain expenses which might be incident to the preservation of the public morals and the protection of the public health was not involved.

"Can it be said that by the contract between the City of Miami and the Florida East Coast Railway the City has limited the exercise of its police power to the prejudice of the general welfare? We do not think so. The City has in no wise limited the exercise of its police power, but, on the contrary, is exercising it; and, if it performs its duty to the public, will continue to do so. There is nothing in the contract whereby the city devests itself of its duty to insure the safety of persons using the crossing. The contention of the appellee that, because the city relieved the railway of the expense of operating the crossing, in consideration of a grant from the railroad by which the city acquired the right to extend Eleventh Street over the railroad's right-of-way, it devested itself of its power to protect the public, is not sound.

"We fail to see wherein there is any surrender of the police power by the city by putting in, operating, and maintaining the crossing; on the contrary, it is exercising its police power when it does this. The question of who pays the expense does not determine whether or not it is a surrender or bartering away of such power. * * *

"In the instant case the City of Miami received from the railway valuable property rights which it could not have taken from it without just compensation. It also received other and greater benefits by the removal of the switching operations, the station and tracks from within the heart of the city to 4 or 5 miles distant. The city, when it entered into this contract with the railway, was no doubt satisfied that it had received ample consideration from the railway for what it agreed to give in return—the expense of operating the crossing.

"Numerous illustrations suggest themselves to show that a contract such as this is not one by which the city devests itself of its police power. Thus, where there was a tract of land within the corporate limits of

a city, on which were mosquito-breeding ponds, marshes, and heavy undergrowth, the city, under its police power, could require the owners to keep the ponds and marshes drained and the undergrowth kept down; but if the owner were to convey this property to the city for use as a public park, and the city, in consideration thereof, should contract to keep the ponds drained and marshes drained and undergrowth kept down, without expense to the owner, it would be clearly within its powers, and such a contract would not be a surrender or bartering away of its police power or its rights to exercise the same. Nor would the city be permitted, after taking possession of the property and converting it into a public park, to repudiate its part of the contract to keep the property drained, and while retaining possession of the property and enjoying the benefits therefrom, require the owner to bear that expense. If the city should subsequently abandon the park and restore the property, it might afterwards require him to bear the expense of keeping it drained, but that question is not presented here, as the City of Miami does not propose to return the street, and from the nature of the acts which have been performed by the railway in accordance with the obligation of its contract, the parties cannot now be restored to the situation in which they were before the contract was entered into."

The order of the Corporation Commission and decision of the Supreme Court of Oklahoma in this case are based on the following sections of the Compiled Oklahoma Statutes of 1921, which read as follows:

"3491. *Jurisdiction of Corporation Commission.* The Corporation Commission is given full jurisdiction over all public highway crossings, where same cross steam or electric railroads or railways within the State of Oklahoma.

"3492. *Expense of Crossings.* The expense of construction and the maintenance of public highway grade

crossings shall be borne by the railroad or railway company involved. For overgrade or undergrade public highway crossings over or under steam or electric railroad or railway, the assignment of cost and maintenance shall be left to the discretion of the Corporation Commission; but in no event shall the city, town or municipality be assessed with more than fifty per cent (50%) of the actual cost of such overgrade or undergrade crossings.

"3493. *Procedure Before Commission.* In all actions arising before the Corporation Commission the same rules as to procedure, notice of hearing and trial, and as to appeals to the Supreme Court, shall be applicable as are prescribed for said Commission, as to transportation companies generally; and the same rules applicable to the enforcement of other orders of the Corporation Commission as to transportation companies shall be applicable to the enforcement of any order or orders made hereunder.

"3494. *Jurisdiction of Commission.* The Corporation Commission shall have exclusive jurisdiction to determine and prescribe the particular location of highway crossings, for steam or electric railways, the protection required, to order the removal of all obstructions as to view of such crossings, to alter or abolish any such crossings, and to require, where practicable, a separation of grade at any such crossing, heretofore or hereafter established.

"3495. *Effect of Partial Invalidity.* The invalidity of any section, subdivision, clause or sentence of this act shall not in any manner affect the validity of the remaining portions thereof."

A somewhat similar controversy was involved in *Morgan's Louisiana, etc., R. Co.* v. *Louisiana Public Service Commission,* in the United States Court for the Eastern District of Louisiana, decision reported in 287 Fed. 390,

where the validity of the contract ordinance was upheld, it being further held that the statutory powers of the Public Service Commission were not broad enough to clearly authorize it to override and supersede the contract between the Railway Company and the City, and the court said:

> "Analyzing the order complained of in this case, it is apparent the Commission is seeking to exercise control over the streets of New Orleans as well as the power of eminent domain. Conceding that the police power can never be contracted away, and that a railroad may be required to construct a crossing over a street, or public road, at its own expense, these principles do not apply to the taking of the private property of a railroad for public use. It is true there is a viaduct already in existence, and the railroad has granted a right-of-way to the public over its property; but it has done so under certain conditions amounting to a contract. To change those conditions now would abrogate the whole contract and restore conditions as they were before. The public could not hold on to the right of passage over the railroad's property without compensation and repudiate the obligations they have assumed, and in consideration of which the right-of-way was granted. *Atchison, T. & S. F. R. Co.* v. *Shawnee,* 183 Fed. 85, 105 C. C. A. 377; *V. S. & P. R. Co.* v. *Monroe,* 48 La. Ann. 1102, 20 South. 664.
>
> "Before the railroad could be required to build a viaduct as ordered, Newton Street would have to be opened across the railroad property. This would require expropriation proceedings instituted by the proper authorities before a competent tribunal. Furthermore, the order requires the use of Newton Street and the building of a structure, with consequent blocking of that street. This certainly is a regulation of the streets and the regulation of its grades."

This decision last above mentioned was affirmed by this court in *Louisiana Public Service Commission* v. *Morgan's*

Louisiana, etc., R. Co., 264 U. S. 393, 68 L. ed. 756, where this court said:

> "It would require more definite language than we find in the Constitution of 1921, or in *Gulf C. & S. F. R. Co.* v. *Louisiana Pub. Serv. Commission,* to convince us that the Commission has power to assume control over all those streets within New Orleans which approach or cross railroad tracks, and to disregard the solemn contracts of the municipality with respect thereto. That the liability which the Commission has undertaken to impose upon appellee conflicts with the contract under which the latter granted permission to construct the viaduct over its property, is not denied. Only very clear and definite words would suffice to show that the state had undertaken to authorize a thing so manifestly unjust and oppressive."

A somewhat similar question was involved in the case of *City of Argentine* v. *Atchison, T. & S. F. R. Co.,* (Kans. 1895) 41 Pac. 946, where the city, by contract with the railway company, undertook and agreed to divide the cost and expense of street crossings by viaduct, the suit being by the railway to collect from the city its portion of the cost of two viaducts constructed in accordance with said agreement, the city contending that it had no authority to make such agreement and was, therefore, not liable. The court held that the contract was valid and binding and that the city was liable and said:

> "It is conceded by the city that it had the power to compel the railroad company to build the viaducts wholly at the expense of the company, and that the city can build them at its own expense under the provisions mentioned there can be little doubt. As the city may construct them entirely at its own expense, no reason is seen why it may not contribute a part of the expense of viaducts determined to be necessary. The questions

of necessity and expediency of viaducts, the character and cost of those which the safety and convenience of the public may require, and the means of providing them, including what proportion of the expenses should be borne by the city and what by the railroad company, are for the determination of the mayor and council, rather than the court. The fact that the city can compel the railroad company to build a viaduct upon certain conditions at its own expense does not prevent the city from sharing the expense under other circumstances where it is deemed to be just that a division of the expense should be made; and that question, like the others which have been mentioned, so far as the municipality is concerned, rests with the legislative authority of the city."

A like case is that of *Hicks* v. *Chesapeake & O. R. Co.*, (Ct. of A., Va. 1903) 45 S. E. 888, the action being for damages for injuries sustained by reason of the alleged failure of the railway company to keep a bridge in repair within the limits of the town of Scottsville. It appears that the railway had a contract with the city by which the city assumed the burden of maintaining the bridge, and the court upheld this contract and said:

"The general law of the state confers upon the town of Scottsville, as upon all municipalities, the power to control and keep its streets in order. Code 1887, Sec. 1038, when a municipality is empowered to control and keep its streets in order, it is charged with a positive duty to do so, and it cannot be relieved from this duty by any act of its own. *Noble* v. *City of Richmond*, 31 Grat. 271, 31 Am. Rep. 726.

"The contention that the contract between the town of Scottsville and the Richmond & Allegheny Railroad Company is *ultra vires* is not tenable. The town cannot deed away the rights of the public to its streets, or transfer to others its duties and obligations with

respect thereto; but it is not unlawful for the municipality, as in the case at bar, to assume the exclusive control and responsibility for its streets. The town of Scottsville had the lawful right to terminate the divided authority over the street in question existing between itself and the railroad; and in making the contract under consideration, by which it assumed the exclusive and undisputed control over its highway, it was only taking upon itself the duty and responsibility imposed upon it by the common law and by statute. The contract in question constitutes a dedication of the bridge by the railroad to the town for the public use, and a complete and formal acceptance thereof by the town, and the defendant in error is thereby released from all responsibility to the public in the premises."

(b) *City has continually ratified contract.*

Inasmuch, therefore, as the City at the time contract Ordinance No. 74 was passed, had the power to provide for the opening of streets and the power to pass ordinances to carry out the power given by the statute and the power to contract therefor, the conclusion would seem to be justified that the contract represented by this contract Ordinance No. 74 is valid and binding. The City has heretofore so considered it, and has lived up to its obligations, as contained in the contract, as shown by the Railway's evidence consisting of the resolution passed and approved by the City after statehood, and in April, 1909, and by the record in the friendly suit in the case of the Railway against the City, No. 1098 on the docket of the Superior Court at McAlester, Oklahoma, wherein judgment was rendered on April 17, 1912, in favor of the Railway and against the City for the amount of its indebtedness under contract Ordinance No. 74 for the cost of construction of certain of the street crossings therein provided for. In the petition of the Rail-

way in that case it set up the contract represented by this Ordinance and the previous history thereof and the acts of the City in ratifying it by the resolutions above referred to, and in the answer filed by the City it will be noted that the City admitted all of the allegations of the Railway's petition. The City has, therefore, continually ratified this contract, and should now be estopped from undertaking to repudiate it.

(c) *City is estopped from repudiating the contract.*

In *State, ex rel. City of Carthage*, v. *Cowgill & Hill Mill Company*, 55 S. W. 1008, the owner of certain real estate made a contract with the city by which it acquired a right of way for a mill race across certain streets, and later made another contract with the city for a valuable consideration by which the city released it from the obligation to repair the bridges extending the streets over said mill race, and the city assumed that burden. A number of years afterwards the city sought to repudiate that contract after having acted in a manner which the court said was consistent with its obligation under the contract, and the court held that it was a fair contract and could not then be repudiated by the city, and said:

> "The city's conduct in this matter, until this suit was brought, has been entirely consistent with its obligation under the agreement. It has kept the bridges in repair, and when the flood came and carried them away it replaced them with the present structures, located so as to indicate a purpose, as suggested by the evidence offered and rejected, to put finer and better structures, more in keeping with the Carthage of today, than would be a duplication of the wooden bridges of 1875. It was a fair agreement made with the mill people; they paid what they agreed, and now good faith and the law alike

require that the city should stand up to the contract on its part. There is a constitutional question in this case which gives this court jurisdiction, but, as the case is disposed of before that question is reached, it is unnecessary to decide it. The evidence makes no case justifying the issuance of the peremptory writ. The judgment of the Circuit Court is reversed. All concur."

In this connection it is said, in Elliott on Contracts, Vol. 1, Sec. 615:

"As a general rule municipal corporations may be estopped by their own act in the exercise of their business powers much the same as any other person or corporation. A municipal corporation may be estopped to deny the validity of a contract as against an innocent party when it has retained the benefit of such contract, it being invalid, not because of want of power on the part of the municipality, but because such power was improperly exercised."

First National Bank of Red Oak v. *City of Emmetsburg*, (Ia. 1912) 138 N. W. 451, was brought to recover a balance due from the city under its contracts for the construction of sewers, which the city refused to pay on the theory that its contracts were illegal. The court commented on the general rule of law permitting the city to make contracts for such business purposes, saying:

"It is apparent, therefore, that cities are authorized by the statute itself to make contracts for the construction of sewers, where the cost thereof is to be paid from a general fund and not from special assessments, and the contracts thus authorized must, we think, relate to the business powers of the city as distinguished from its governmental powers. It seems to be correctly held generally that a city has two classes of powers, which have been stated as follows: 'A city has two

classes of power—the one legislative, public, governmental, in the exercise of which it is the sovereignty and governs its people; the other, proprietary, *quasi*-private, conferred upon it, not for the purpose of governing its people, but for the private advantage of the inhabitants of the city itself as a legal personality. In the exercise of the powers of the former class, it is governed by the rule here invoked. In their exercise it is ruling its people and is bound to transmit its powers of government to its successive sets of officers unimpaired. But in the exercise of the powers of the latter class it is controlled by no such rule, because it is acting and contracting for the private benefit of itself and inhabitants, and it may exercise the business powers conferred upon it in the same way, and in their exercise it is to be governed by the same rules that govern a private individual or corporation'."

The court then said that the city should be required to live up to its contract, just the same as an individual would be required to, and said:

"Whatever may have been the rights of the property owners who were specially assessed for this improvement, we think it clear that the city should be held to the same business integrity that the law requires of any other corporation, or of an individual, and that the rules of estoppel and waiver should be applied to their business dealings as completely and as effectively as to other business transactions. There is, in our opinion, no legal reason, and there certainly is no moral one, whereby a municipal corporation should be permitted to reap the benefit of a fully completed contract and escape liability therefor under the plea of *ultra vires*, where the power exists to contract, but the same has been exercised in a negligent manner and even so irregularly as to release non-contracting parties from liability. That a city may be estopped under such circumstances, is well settled by our own decisions."

The court cited as an additional reason for upholding the contract that it represented a compromise and an accord and satisfaction, and said:

> "Furthermore, it is conclusively shown that there was a compromise and an accord and satisfaction, and this was as binding on the defendant city as would have been the case had plaintiff been dealing with a private corporation or individual."

(d) *Contract is a business contract.*

This contract Ordinance No. 74 is a business contract by which the City secured for its citizens that which they did not have before, and acquired by contract the right of way for street crossing purposes in consideration for which it agreed to pay for the constructing of the crossings, or a portion thereof.

In section 603, volume 1, Elliott on Contracts, it is said:

> "In contracting for the construction or purchase of waterworks to supply itself and its inhabitants with water, a city is not exercising governmental or legislative, but is using its business or proprietary powers. The purpose of such a contract is not to govern its inhabitants, but to obtain a private benefit for the city and for its denizens."

As above stated, this Ordinance contract is a business contract, and not a legislative one, and the City should now be held to be estopped from claiming that it was not authorized to make such a contract, particularly as it has thereby secured several of the crossings and the contribution of the Railway Company to the construction thereof, and a waiver of damages on the part of the Railway Company, and the parties cannot now be put in the same posi-

tion they were in before the contract was entered into. See Elliott on Contracts, Vol. 1, section 615, reading in part as follows:

> "As a general rule municipal corporations may be estopped by their own act in the exercise of their business powers much the same as any other person or corporation. A municipal corporation may be estopped to deny the validity of a contract as against an innocent party when it has retained the benefit of such contract, it being invalid, not because of want of power on the part of the municipality, but because such power was improperly exercised."

In *City of Tulsa* v. *Oklahoma Natural Gas Co.*, United States Court for the Eastern District of Oklahoma, 4 Fed. (2d series) 399, it was held that a city of the old Indian Territory under Arkansas laws then in force, in making a contract with a gas company, including provisions for lighting its streets, was acting in a business and not a governmental capacity. The reporter's syllabus No. 1, in accord with the opinion, is as follows:

> "Under Mansf. Dig., Ark., Sec. 749, 754, 755, by Act Cong., May 2, 1890, extending to the Indian Territory, and providing that cities and towns shall have power to contract, to provide for lighting streets, to authorize the construction of gas works, and to contract with any person or company to construct and operate the same, with the exclusive privilege of using the streets and alleys for an agreed time for such purpose, as such provisions have been construed by the Supreme Court of Arkansas and the Court of Appeals of Indian Territory, which decisions are persuasive if not binding on a federal court, a city in making a contract with a gas company was acting in its proprietary or business, and not in its governmental, capacity."

See also the decision of this court in *Los Angeles* v. *Los Angeles Gas & Electric Corporation,* 251 U. S. 32, 64 L. ed. 121, which is to like effect.

(e) *The contract is not ultra vires and the City cannot now be heard to so contend.*

Neither should the city at this late date be heard to say that this old contract Ordinance No. 74 is *ultra vires* and void. This court has well said that the rule of *ultra vires* ought to be reasonably and not unreasonably understood and applied, and not to abrogate contracts reasonably within the power of municipalities to make. See *Atlas Life Insurance Co.* v. *Board of Education of the City of Tulsa,* (not officially reported) 200 Pac. 171. The opinion by Mr. Justice KANE shows that this was an action for specific performance of a contract represented by a 99-year lease executed by the board of education of the city and assigned to the insurance company covering certain premises described therein, and in upholding the lease contract, the court said:

> "Finally, we are strongly of the opinion that the rule of *ultra vires* ought to be reasonably and not unreasonably understood and applied, and that whatever may fairly be regarded as incidental to and consequential upon those things which the legislature has authorized municipal corporations to do ought not, unless expressly prohibited, be held by judicial construction to be *ultra vires.*"

Hitchcock, et al., v. *City of Galveston,* 96 U. S. 341, 24 L. ed. 659, involved a contract of the city with plaintiffs for the construction of sidewalks and after the work was done and the city had received the benefits thereof, it sought to repudiate the contract as being *ultra vires,* but the court

held that the city had the authority to have the sidewalks constructed and to do whatever was necessary for the construction and not prohibited by law, and that it was bound by the contract and if the contract was irregular it had been ratified by the city. The court said:

> "It is contended, on behalf of the defendants, that the City of Galveston had no power given to it by law to make the contract which was made, or bind itself to pay with the bonds described, for sidewalk improvements. The contract was made on behalf of the city by the mayor and the chairman of the committee on streets and alleys, who had been authorized and directed by ordinance 'to enter into and make contract or contracts with proper and responsible parties to fill up, grade, curb, and pave the said sidewalks' (those designated in the ordinance and mentioned in the contract); and, as the petition of the plaintiffs averred, it was ratified and approved by the city council as the act and deed of the defendant. The authority of the council is found in the charter of the city. The 1st section of title 9, article 1, of the charter declares that the city council shall be invested with full power and authority to grade, shell, repair, pave or otherwise improve any avenue, street or alley, or any portion thereof within the limits of said city, whenever by a vote of two-thirds of the aldermen present they may deem such improvement to be for the public interest. And section 8, article 3, title 4, confers upon the city council power 'To establish, erect, construct, regulate and keep in repair, bridges, culverts and sewers, sidewalks and crossways, and to regulate the construction and use of the same;' and the section adds, that 'The cost of the construction of sidewalks shall be defrayed by the owners of the lot, or part of lot or block fronting on the sidewalk, and *the cost of any sidewalk constructed by the city shall be collected*, if necessary, by the sale of the lot, or part of the lot or block on which it fronts, together *with the cost of collection, in such a manner as the city council may by or-*

dinance provide; and a sale of any lot, or part of lot or block, to enforce collection of cost of sidewalks, shall convey a good title to purchaser,and the balance of the proceeds of sale, *after paying the amount due the city,* and cost of sale, shall be *paid by the city to the owner.'*

"The city is thus authorized itself to construct sidewalks and, though the cost of construction is to be defrayed by the abutting lot owners the city is to collect from them the cost and, in case of the sale of any lot made to enforce*d* the collection, the city is to pay to the owner the surplus of any proceeds of sale remaining after payment of the amount due to it. It is not to be denied that this section confers upon the city council plenary authority to construct the sidewalks and to do whatever is necessary for the construction, not prohibited by some other provision of law. The resort to the lot owners is to be after the work has been done, after the expense has been incurred, and it is to be for reimbursement to the city.

"And if the city council had lawful authority to construct the sidewalks, involved in it was the right to direct the mayor, and the chairman of the committee on streets and alleys, to make a contract on behalf of the city for doing the work. We spend no time in vindicating this proposition. It is true, the council could not delegate all the power conferred upon it by the legislature, but, like every other corporation, it could do its ministerial work by agents. Nothing more was done in this case. The council directed the pavements, ordering them to be constructed of one or the other of several materials, but giving to the owners of abutting lots the privilege of selecting which, and reserving to the chairman of their committee authority to select in case the lot owners failed. The council also directed how the preparatory work should be done. There was, therefore, no unlawful delegation of power. But, if there had been, the contract was ratified by the council after it was made."

Washington Water Power Co. v. *City of Spokane,* (Wash. 1916) 154 Pac. 329, involved a contract by which the land owner granted the city an easement for street purposes across its premises, the city to relieve it from the burden of sidewalks and paving and to bear that expense itself. The title to the land was finally acquired by the power company, plaintiff in the case, and the city sought to repudiate the contract by its being void, but the court commented on the fact that the city had the right to acquire the easement and, therefore, the right to accept the conditions, and referred to the Galveston case, *supra,* and said:

> "Under laws 1889-90, p. 219, Sec. 5, Subd. 6, the City of Spokane had power to purchase private property for corporate purposes, and we see no evil in making the compensation to be paid dependent on a future contingency. The city has accepted the benefits from the deed and is seeking to escape the burdens. As stated by Mr. Justice STRONG in *Hitchcock* v. *Galveston,* 96 U. S. 341, 24 L. ed. 659, the city 'having received benefits at the expense of the other contracting party, it cannot object that it was not empowered to perform what it promised in return, in the mode in which it promised to perform'."

(f) *Rights under the contract have vested.*

Vested rights and contract rights beneficial both to the City and to the Railway have attached to this old contract Ordinance No. 74; the Railway has given up its rights to damages in some instances and the City has participated in the expense of some of the crossings, as provided for in the contract, and the contract should not now be struck down, but should be protected by section 1 to the schedule of the Constitution of Oklahoma, providing that no existing rights,

contracts or claims shall be affected by the change in the form of government.

A vested right has been defined by this court in *Crump* v. *Guyer, et al.*, 60 Okl. 222, 157 Pac. 321, as follows:

> "But, a 'vested right' is the power to perform certain actions or to possess certain things lawfully, and is substantially a property right; and when it has been once conferred or become absolute by contract or existing laws, it is protected from invasion by the legislature, by those provisions in the Constitution which apply to such rights. In *State* v. *Julow*, 129 Mo. 163, 31 S. W. 781, 29 L. R. A. 257, 50 Am. St. Rep. 443, Justice SHERWOOD, in discussing this question, says that property is placed in the constitution in the same category with liberty and life. And 'where rights of property are admitted to exist, the legislature cannot say they shall exist no longer'; that if it were otherwise—'the constitution would then mean that no person shall be deprived of his property or rights unless the legislature shall pass a law to effectuate the wrong; and this would be throwing the restraint entirely away'."

In *Enid City Railway Company* v. *City of Enid*, 43 Okl. 778, 144 Pac. 617, this court held that the railway company had a vested contract right in the provision of its franchise ordinance limiting its liability as to street paving. The court said:

> "Under this section it cannot be doubted that the City of Enid was authorized to pass the ordinance in question. That such ordinance, when accepted by plaintiff in error, the terms and conditions thereof complied with, and the street railway lines constructed thereunder, constitutes a valid contract, must be admitted."

There is not only a moral obligation on the part of the city to continue to live up to the provisions of this contract

Ordinance No. 74, which has determined the rights of the City and the Railway for so many years, but it is also confidently insisted that in view of all the facts and the history of the past transactions under the Ordinance, the City should, as a legal proposition, be held to be firmly bound by the provisions of the Ordinance and no questions of police power should be allowed to enter into the matter except to confirm the contract, which is, in reality, in furtherance of the police power. Neither the order of the Corporation Commission nor the 1919 Act should be held to change or abrogate the provisions of this contract Ordinance, nor make it possible for the City to avoid its terms, thereby taking away the vested and contract rights of the parties thereto in violation of section 10, article 1 of the Constitution of the United States prohibiting the violation of the obligation of contracts In this connection the following quotations from sections 2725, 2729 and 2763 of Elliott on Contracts, volume 3, seem to be appropriate and worthy of great consideration:

> "*Sec. 2725.* The provision of the constitution against impairing obligations of contracts, does not apply to a statute in respect to contracts made after its passage. It is only those contracts in existence when the statute is enacted that are protected from its effect. No act of the legislature can alter the nature and legal effect of an existing contract to the prejudice of either party. The rule is that a statute affecting rights and liabilities should not be so construed as to act upon those already existing, and it is the result of the decisions that, although the words of the statute are so general and broad in their literal extent as to comprehend existing cases, they must yet be so construed as to be applicable only to such as may thereafter arise unless the intention to embrace all is clearly expressed.

To be invalid as impairing the obligation of contracts, a statute must be one enacted after the execution of the contract, the obligation of which is claimed to be impaired. * * *"

"*Sec. 2729.* The prohibition of the constitution against laws impairing the obligation of contracts applies to all contracts, executed and executory, whoever may be parties to them. This clause of the constitution is more generally invoked to protect executory contracts, but it applies equally to executed contracts. The legislature cannot arrest performance by impairing the obligation to perform, nor can it wait until after performance, and then by legislation undo and rescind the contract and restore parties to the rights transferred by the acts of performance. Neither party can undo what has been fully executed and completed, and the law therefore implies a contract that neither party will attempt to do so. * * *"

"*Sec. 2763.* The prohibition against the impairment of contracts is usually violated by any enactment which makes it possible for a county or municipality to evade liability on its valid obligations."

The provisions of the Commission's order which seek to declare invalid the contract Ordinance and to require the parties to attempt to agree on a division of the cost of the construction of the subway, ought, therefore, in all good conscience to be declared by this court to be null and void.

II.

The Oklahoma Statutes, as construed by the Supreme Court of Oklahoma, if intended to authorize the Corporation Commission to place burdens and obligations on plaintiffs in error in conflict with and contrary to contract Ordinance No. 74, are unconstitutional, depriving them of their property without due process of law and without compensation and denying them the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of United States and denying them the right of contract and impairing the obligation of contracts, in violation of section 10 of article I of the Constitution of the United States. ***(Specification of Error 4.)***

As has been shown by the foregoing argument in this brief, the parties to contract Ordinance No. 74 had a legal right to enter into it and it was for the mutual benefit of both parties and should be held to constitute a vested right which cannot now be impaired by subsequent legislation, either statutory or by orders of the Corporation Commission.

The same rule of law would apply to declare these statutory provisions invalid as applies as hereinabove set forth to declare the Corporation Commission order invalid, so far as it affects the old contract Ordinance No. 74 between the parties hereto.

Attention is again called to the decision in *Morgan's Louisiana, etc., R. Co.* v. *Louisiana Public Service Commission,* 287 Fed. 390, affirmed in *Louisiana Public Service Commission* v. *Morgan's Louisiana, etc., R. Co.,* 264 U. S. 393, 68 L. ed. 756, in support of the argument that even could legislation be legally enacted which would deprive the plaintiffs in error of their contract rights under Ordi-

nance No. 74, that the Oklahoma Statutes are not broad enough or definite enough to clearly show that the state has undertaken to authorize "a thing so manifestly unjust and oppressive."

The land grant act under which the Railway Company acquired its right-of-way and premises through McAlester and the Indian Territory contained no provision by which the Railway Company was obligated to construct public highway crossings over its premises or separate the grades thereof from that of its tracks, and the Arkansas Statutes *supra,* in force when contract Ordinance No. 74 was enacted, did not place such obligation on the Railway Company, and hence the city was not, at the time, in reality giving up any right it had in that particular in entering into the contract relied on herein, but was gaining the right to extend its streets over the railway premises, and hence, for this additional reason, it could not be said that the city, at the time it entered into the contract in question, was contracting away any of its existing police power.

It is respectfully submitted, therefore, that the decision of the Supreme Court of Oklahoma should be reversed and the cause remanded for dismissal, and the contract ordinance should be held valid.

Respectfully submitted,

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